



National Aeronautics and
Space Administration
Washington, DC 20546

Procurement Class Deviation

PCD 21-03C

October 1, 2021

November 8, 2021

December 9, 2021

November 02, 2022

CLASS DEVIATION FROM THE FEDERAL ACQUISITION REGULATION (FAR) FOR EXECUTIVE ORDER 14042, ENSURING ADEQUATE COVID SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS

PURPOSE: To provide a procurement class deviation (PCD) from the FAR to implement the requirements of Executive Order (E.O.) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, signed by the President on September 9, 2021 (and published in the Federal Register on September 14, 2021, at 86 FR 50985).

GUIDANCE: E.O. 14042 directs executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. § 102(4)(A), to ensure that covered contracts and contract-like instruments include a clause requiring contractor and any subcontractors (at any tier) to comply with all guidance for covered contractor or subcontractor workplace locations as published by the Safer Federal Workforce Task Force (refer to as Task Force in this document) at:
<https://www.saferfederalworkforce.gov/contractors/>.

The actions directed by this E.O. will ensure that contractors and any subcontractors (at any tier) contracting with the Federal Government will provide COVID-19 safeguards in workplaces with employees working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all contractors and any subcontractors (at any tier) in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument. These safeguards will decrease the spread of COVID-19, which will, in turn, decrease worker absences, reduce labor costs, and improve the efficiency of contractors and subcontractors performing work for the Federal Government.

The Department of Defense (DoD), General Services Administration (GSA), and NASA have started the formal rulemaking process to incorporate this change into the FAR. These rulemaking changes will be published in the Federal Register via FAR Case 2021-021, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, to make appropriate amendments in the FAR to include the requirements

of this E.O.

The FAR Council and the Office of Federal Procurement Policy (OFPP) provided direction to agencies for the incorporation of a clause in solicitations and contracts in the memorandum titled "Issuance of Agency Deviations to Implement Executive Order 14042," dated September 30, 2021, found here: <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>. NASA implementation is set forth in the deviation clause enclosed in this PCD. Subsequent guidance has been received from the Office of Management and Budget (OMB) regarding grants and cooperative agreements. The Office of Chief Financial Officer, Office of Procurement, Grants Policy & Compliance Branch will be issuing separate guidance specific to grants and cooperative agreements.

In accordance with the Safer Federal Workforce Task Force Guidance (Task Force Guidance), which states in part "...agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order...", NASA has decided to incorporate the clause requiring compliance with this Task Force Guidance into acquisitions that are not covered or directly addressed by this E.O. in order to maximize the goal of getting more people vaccinated and decrease the spread of COVID-19.

To support transparency in connection with the implementation of the E.O., and the Task Force Guidance, a central collection of data is being implemented via contract action reports (CARs) submitted to the Federal Procurement Data System (FPDS). This is necessary to support federal-wide analysis of implementation progress and visibility into the steps taken to safeguard workers in accordance with the OMB Email to the Chief Acquisition Officers Council "Tracking Implementation of Executive Order 14042," dated October 19, 2021.

On December 7, 2021, the United States District Court for the Southern District of Georgia Augusta Division (hereinafter "the Court") ordered a [nationwide injunction](#) enjoining the Government from implementing E.O. 14042 in all covered contracts. As a result, NASA will take no action to enforce the clause implementing requirements of E.O. 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the E.O. (hereinafter, "Excluded State or Outlying Area"). A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

Subsequently, on August 26, 2022, the U.S. Court of Appeals for the Eleventh Circuit (hereinafter "the Appeals Court") held that the Court erred in issuing a nationwide injunction, and that the Court's order prohibiting enforcement should apply only to the parties in the case. The Appeals Court's ruling took effect on October 18, 2022. As a result of this ruling taking effect, active court orders will prohibit enforcement of E.O. 14042 in some locations and as to some entities.

Despite the lifting of the nationwide bar to enforcement on October 18, 2022, at this time, agencies should **NOT**: (1) take any steps to require covered contractors and subcontractors to come into compliance with previously issued Task Force guidance; or (2) enforce any contract clauses implementing E.O. 14042.

As set forth in the [October 14, 2022 Update Regarding Executive Order 14042 from the Office of Management and Budget, \(OMB\) and the Task Force](#), the Task Force intends to update its guidance regarding COVID-19 safety protocols for covered contractor and subcontractor workplace locations.

In the interim, to allow time to develop advice and processes for meeting agencies' obligations under E.O. 14042 and applicable court orders, NASA contracting officers should follow the instructions provided below. Note: This guidance provided in the OMB email to the Chief Acquisition Officers Council "Update on implementation of EO 14042," dated October 19, 2022.

ACTION REQUIRED BY CONTRACTING OFFICERS: Effective immediately ~~and no later than October 15, 2024~~, for commercial and non-commercial acquisitions that include requirements for services, supplies, research and development, construction, and end-items, **DO NOT** insert the attached clause and preamble pertaining to enforcement in the following:

- All new solicitations and resulting contracts, orders, and blanket purchase agreements (BPAs) above the micro-purchase threshold (MPT) issued on or after the effective date of this PCD; and
- All existing contracts, orders, and BPAs above the simplified acquisition threshold (SAT) via a bilateral modification.
- ~~All solicitations above the MPT issued prior to the effective date of the PCD.~~

For existing solicitations and contracts for commercial and non-commercial acquisitions that include requirements for services, supplies, research and development, construction, and end-items, take the following actions:

- For existing solicitations above the MPT that already include the clause **and preamble**, **continue NOT to enforce**, ~~amend the solicitation to include the preamble language regarding enforcement prior to~~ the clause;
- For existing contracts, including subcontracts, that do not include the clause and have performance entirely in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area, **DO NOT** ~~cease all efforts to~~ pursue efforts to include ~~ing~~ the clause **and preamble** via modification; and
- ~~For Existing~~ contracts that have been previously modified to incorporate the clause **and preamble**, **DO NOT remove the clause and preamble and continue NOT to enforce the clause.** ~~are not required to be modified again to incorporate this latest clause revision with the preamble.~~

The use of this clause **and preamble** shall be excluded from the following:

- Solicitations and contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (does not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); and
- Solicitations and contracts if performance is outside the United States or its outlying

areas (limited to employees who are performing work only outside the U.S. or its outlying areas).

FPDS Reporting:

- At the beginning of the “Description of Requirement” data field on the contract action report (CAR) enter **EO14042** (with no spaces or punctuation breaking up the EO identifier; the second character of the entered text is an “O” (as in Oscar) and the fifth character is a zero (0)).
- Additional information shall be entered into the “Description of Requirement” data field after the EO14042 identifier, with no further restrictions on spaces or punctuation, to provide the actual description of the requirement for the contract.
- Modifications or awards issued prior to the issuance of this instruction and on or after September 30, 2021, shall update their records in FPDS by December 1, 2021.
- Do not include the “National Interest Action” (NIA) data field on the CAR for COVID-19 (code P20C) solely to implement the attached clause. The NIA code should only be used when the action meets the requirements identified in PIC 20-01.

Note: The court orders discussed in this guidance apply only to the application of requirements pursuant to E.O. 14042. There is no change to the Safer Federal Workforce Task Force’s guidance for COVID-19 workplace safety protocols for Federal agencies pursuant to E.O. 13991. Federal agency workplace safety protocols for Federal buildings and Federally-controlled facilities still apply in all locations. Contractor employees working onsite in those facilities must still follow those Federal agency workplace safety protocols.

EFFECTIVE DATE: This PCD is effective as dated and shall remain in effect until it is incorporated into the FAR, or until this class deviation is otherwise rescinded or revised.

CLAUSE CHANGES: FAR clause 52.223-99 (Deviation 21-03).

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Enclosure

AR Deviation Text Additions shown in [bold brackets]; Deletions shown as ~~strike throughs~~; and FAR text unchanged shown as asterisks * * * or * * * * *.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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Subpart 52.2—Text of Provisions and Clauses

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[NASA will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order (hereinafter, “Excluded State or Outlying Area”). In all other circumstances, NASA will enforce the clause, except for contractor employees who perform substantial work on or in connection with a covered contract in an Excluded State or Outlying Area, or in a covered contractor workplace located in an Excluded State or Outlying Area. A current list of such Excluded States and Outlying Areas is maintained at <https://www.saferfederalworkforce.gov/contractors/>.

52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (DEVIATION 21-03)

(a) *Definition.* As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) *Authority.* This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) **Compliance.** The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) **Subcontracts.** The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the micro-purchase threshold, as defined in Federal Acquisition Regulation 2.101, performed in whole or in part within the United States or its outlying areas.

(End of clause)]